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HSBC Bank Malaysia Bhd v Kanaga Laksmi & Ors

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HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–131–08 OF 2016
AZIZUL AZMI ADNAN JC
21 NOVEMBER 2016

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Civil Procedure — Judicial review — Certiorari — Application for — Respondents applied for certain correspondence between applicant and Bank Negara to be produced — Applicant objected on basis s 151(1) of the Financial Services Act 2013 ('the FSA') prohibited disclosure of information — Whether Industrial Court was not 'court' for the purposes of s 151(3) of the FSA — Whether ruling by Industrial Court amounted to error of law — Whether necessary to determine correct construction of s 151 of the FSA

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This was an application for an order for certiorari to set aside the interim awards, on the basis that the ruling by the Industrial Court amounted to an error of law. In a course of proceedings pursuant to s 20 of the Industrial Relations Act 1967 ('the IRA'), the respondents applied for certain correspondence between the applicant and Bank Negara to be produced. The applicant objected to the aforementioned application on the basis that: (a) s 151(1) of the Financial Services Act 2013 ('the FSA') prohibited disclosure of the information; and (b) although s 151(3) of the FSA permitted the disclosure of documents or information that were subject to the Bank Negara privilege in court proceedings, the Industrial Court was not a 'court' for the purposes of s 151(3) of the FSA. In the interim award delivered on 16 June 2016, the Industrial Court ruled that the word 'court' when used in s 151(3) of the FSA included the Industrial Court and the expression 'court proceedings' in the same section encompassed proceedings before the Industrial Court. The court then directed the applicant to produce the relevant documents to the respondent's solicitors. Hence, the application for judicial review. The issue for determination here was whether the Industrial Court is encompassed within the meaning of the word 'court' for the purposes of s 151(3) of the FSA.

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Held, allowing the application with no order as to costs:

(1) The court was of the view that the word 'court' for the purposes of s 151(3) of the FSA did not include a court of arbitration such as the Industrial Court. The first reason being that as established, the Industrial Court was a creation of statute and did not have any inherent jurisdiction. Its powers emanated from the empowering legislation, the IRA. Secondly, a purposive and contextual construction of s 151(3), as

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allowed by s 17A of the Interpretation Acts 1948 and 1967, established the word 'court' would not include the Industrial Court. Further 'court' was not specifically defined in the FSA and appears in various sections of the Act. The use of the word 'court' in the FSA established that parliament had intended to refer to the courts of law and that arbitral tribunals or courts of arbitration would not be encompassed with this term. Therefore, a contextual construction of the word 'court' excluded the Industrial Court (see paras 8 & 11).

(2) The alternative interpretation was that the power of the court to order the production of any document would be an inherent power of the court, and s 151(3) of the FSA merely provided, firstly, guidance to the court as to how to exercise its discretion in making any order for the production of documents that were subject to Bank Negara privilege, and secondly, for the consequences that flow from an order for proceedings to be held in camera. Regardless of the interpretations, the conclusion would remain the same, the word 'court' would necessarily refer to the court of law, and not a court of arbitration like the Industrial Court (see paras 17–18).

[Bahasa Malaysia summary

Ini adalah permohonan untuk perintah bagi certiorari untuk mengetepikan award sementara, atas dasar bahawa perintah oleh Mahkamah Perusahaan merupakan kesilapan undang-undang. Dalam prosiding berikutan s 20 Akta Perhubungan Perusahaan 1967 ('APP'), responden-responden memohon untuk surat-menyurat tertentu di antara pemohon dan Bank Negara untuk dikemukakan. Pemohon membantah kepada permohonan yang disebut di atas dasar bahawa: (a) s 151(1) Akta Perkhidmatan Kewangan 2013 ('APK') melarang pengemukaan maklumat; dan (b) walaupun s 151(3) APK membenarkan pengemukakan dokumen atau maklumat yang tertakluk kepada keistimewaan Bank Negara dalam prosiding mahkamah, Mahkamah Perusahaan bukan 'court' bagi tujuan s 151(3) APK. Dalam award sementara yang diberikan pada 16 Jun 2016, Mahkamah Perusahaan memutuskan bahawa perkataan 'court' apabila digunakan di dalam s 151(3) APK termasuk Mahkamah Perusahaan dan expression 'court proceedings' di dalam seksyen yang sama merangkumi prosiding di hadapan Mahkamah Perusahaan. Mahkamah kemudiannya mengarahkan pemohon untuk mengemukakan dokumen relevan kepada peguam responden-responden. Maka, permohonan untuk semakan kehakiman. Isu untuk penentuan di sini adalah sama ada Mahkamah Perusahaan termasuk dalam maksud perkataan 'court' untuk tujuan s 151(3) APK.

Diputuskan, membenarkan permohonan tanpa perintah terhadap kos:

(1) Mahkamah berpendapat bahawa perkataan 'court' bagi tujuan s 151(3) APK tidak termasuk mahkamah timbang tara seperti Mahkamah

Perusahaan. Alasan pertama seperti yang dibuktikan, Mahkamah Perusahaan adalah ciptaan statut dan tidak mempunyai apa-apa bidang kuasa inherens. Kuasanya berpunca daripada undang-undang yang memberi kuasa, APK. Kedua, tafsiran pendekatan dan kontekstual s 151(3), seperti yang dibenarkan oleh s 17A Akta Tafsiran 1948 dan 1967, membuktikan perkataan 'court' tidak akan memasukkan Mahkamah Perusahaan. Selanjutnya 'court' tidak mentafsirkan secara khusus APK dan terdapat di dalam pelbagai seksyen Akta. Penggunaan perkataan 'court' di dalam APK membuktikan bahawa Parlimen telah berniat untuk merujuk kepada mahkamah undang-undang dan bahawa tribunal timbang tara atau mahkamah timbang tara tidak akan dirangkumi dengan terma ini. Oleh itu, tafsiran kontekstual perkataan 'court' mengecualikan Mahkamah Perusahaan (lihat perenggan 8 & 11).

(2) Tafsiran alternatif adalah bahawa kuasa mahkamah untuk memerintah pengemukaan apa-apa dokumen akan menjadi kuasa inherens mahkamah, dan s 151(3) APK hanya memperuntukkan, pertama, panduan kepada mahkamah bagaimana untuk melaksanakan budi bicaranya dalam membuat apa-apa peritah untuk pengemukaan dokumen-dokuemen yang tertakluk kepada keistimewaan Bank Negara, dan kedua, bagi akibat yang datang daripada perintah untuk prosiding diputuskan in camera. Tanpa menghiraukan tafsiran, kesimpulan akan kekal sama, perkataan 'court' semestinya merujuk kepada mahkamah undang-undang, dan bukan mahkamah timbang tara seperti Mahkamah Perusahaan (lihat perenggan 17–18).]

Notes

For cases on certiorari, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5956–5968.

Cases referred to

Isuta International Sdn Bhd & Ors v Mahkamah Perusahaan Malaysia & Anor [2013] 8 CLJ 1040, HC (distd)

Kanaga Laksmi Paramasivam & Ors v HSBC Bank Malaysia Bhd [2016] 2 LNS 0731, IC (refd)

Lee Wah Bank Limited v National Union of Bank Employees [1981] 1 MLJ 169 (refd)

Legislation referred to

Companies Act 1965 s 226(3)

Financial Services Act 2013 ss 133, 134, 151, 151(1), (2), (3), 183, Eleventh Schedule, Item 6

Industrial Relations Act 1967 s 20

Interpretation Acts 1948 and 1967 ss 3, 17A

Sivabalah Nadarajah (Jamie Goh Moon Hoong with him) (Shearn Delamore & Co) for the applicant.
S Muhendaran (Muhendaran Sri) for the respondent.
Khairul Fazly bin Kamarudin (Wan Nur Atiqah with him) as amicus curiae for Bank Negara Malaysia.

Azizul Azmi Adnan JC:

[1] The crisp issue for determination in this application was whether the Industrial Court is encompassed within the meaning of the word 'court' for the purposes of s 151(3) of the Financial Services Act 2013 ('the FSA').

BACKGROUND

[2] The applicant, HSBC Bank Malaysia Bhd ('HSBC'), had restructured its call centre operations, as a result of which the respondents were retrenched. The respondents thereafter made representations to the Minister of Human Resources pursuant to s 20 of the Industrial Relations Act 1967, following which the matter was referred to the Industrial Court.

[3] In the course of proceedings before the Industrial Court, the respondents applied for certain correspondence between HSBC and Bank Negara Malaysia to be produced for the purposes of the Industrial Court proceedings. These included the letter from Bank Negara to HSBC approving the outsourcing of its call centre operations.

[4] HSBC objected to the application, on the basis that s 151(1) of the FSA prohibited the disclosure of such information. Counsel for HSBC contended that, although s 151(3) permits the disclosure of documents or information that are subject to the Bank Negara privilege in court proceedings, the Industrial Court is not a 'court' for the purposes of s 151(3) of the FSA.

[5] In an interim award delivered on 16 June 2016 (reported at *Kanaga Laksmi Paramasivam & Ors v HSBC Bank Malaysia Bhd* [2016] 2 LNS 0731), the Industrial Court ruled that the word 'court' when used in s 151(3) includes the Industrial Court, and that the expression 'court proceedings' in the same section encompasses proceedings before the Industrial Court. As a consequence, the court directed HSBC to produce the relevant documents to the respondent's solicitors.

[6] Before me, HSBC filed an application for certiorari to set aside the interim award, on the basis that the ruling by the Industrial Court amounted to

an error of law. When the application for leave of court came up before me, I had requested Mr Sivabalah to invite Bank Negara to appear as amicus curiae in this matter.

ANALYSIS AND DECISION

[7] Section 151(3) of the FSA provides as follows:

> (3) In any court proceedings, where any document or information referred to in this section is likely to be disclosed, the court, of its own motion, or at the application of a party to the proceedings or the Bank, may order for such proceedings to be held in camera and in such case, the document or information shall be secret as between the court and parties or the Bank thereto, and no such party shall disclose such document or information to any other person.
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> (Note: 'Bank' here means Bank Negara.)

[8] In my judgment, the word 'court' for the purposes of s 151(3) of the FSA does not include a court of arbitration such as the Industrial Court. The reasons for my coming to this decision were twofold:

(a) firstly, it is well established that the Industrial Court is a creation of statute and does not have any inherent jurisdiction. The powers of the Industrial Court must therefore emanate from its empowering legislation, the Industrial Relations Act 1967. See *Lee Wah Bank Limited v National Union of Bank Employees* [1981] 1 MLJ 169, where it was held as follows:

> How wide then are the powers of the Industrial Court under s 30(6)? According to s 30(6) of the Act the Industrial Court in making an award should not be bound to restrict itself to the specific relief asked for nor to the demands of the parties. The Industrial Court in making the award may include in the award any matter which it thinks necessary or expedient for the purpose of settling the dispute or the reference. That is the gist in cl (6) of s 30 of the Act. In my view the apparent broadness of the language used here does not go beyond what is already conferred on any person (or body) by s 40(1) of the Interpretation Act 1967. Section 40(1) reads as follows:
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> > 40(1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.
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> These are powers which are necessarily implied and nothing more. Since the Industrial Court is a creature of the Industrial Relations Act 1967 its powers must be discovered only from the four corners of the Act — expressly or by necessary implication — see also *Baroness Wenlock v River Dee Company* 36 Ch D 674 and *The Attorney-General & Ephraim Hutchings v The Directors, etc, of The Great Eastern Railway Company* (1880) 5 App Cas 473.

In my view, on its true construction, s 151(3) either has the effect of providing

for a power of court to require the production of documents that are the subject of the Bank Negara privilege, or of providing for the manner in which the inherent jurisdiction of the court is to be exercised when a court orders for the production of such documents.

If s 151(3) is an empowering provision, then it is clear that the provision cannot provide for a power of the Industrial Court, for that would be contrary to the principle that the Industrial Court derives its powers entirely from the four corners of the Industrial Relations Act 1967.

On the other hand, if s 151(3) has the effect of simply providing for the manner in which a curial discretion is to be exercised when dealing with documents that are subject to the Bank Negara privilege, then equally the provision could not be taken to refer to the Industrial Court, as the Industrial Court has no inherent jurisdiction.

At para 13 below, I discuss the two alternative interpretations of s 151(3) of the FSA; and

(b) secondly, a purposive and contextual construction of s 151(3) will establish that the word 'court' would not include the Industrial Court. Section 17A of the Interpretation Acts 1948 and 1967 ('the Interpretation Act') allows this court to have regard to the purpose or object of an Act for the purposes of interpreting the provision of the Act.

'Court' is not specifically defined in the FSA. In s 3 of the Interpretation Acts, 'court' is defined simply as a 'court of competent jurisdiction'.

It will be seen that the word 'court' appears in various sections of the FSA. In my judgment, the use of the word 'court' in the FSA establishes that parliament had intended to refer to the courts of law and that arbitral tribunals or courts of arbitration would not be encompassed within this term. The following instances support this construction:

(i) s 133 of the FSA provides for the secrecy of customer information. Section 134 permits the disclosure of such information for certain purposes and in certain instances. These include where the disclosure is being made in compliance with a court order. The specific provision in Item 6 of the Eleventh Schedule to the FSA provides as follows:

> Compliance with a court order made by a court not lower than a Sessions Court.

This provision therefore suggests the word 'court', where it is used in the FSA, is intended to refer to the courts of law and would not include a court of arbitration such as the Industrial Court; and

(ii) where in the FSA Parliament had intended to refer to other bodies exercising any quasi-judicial function, the FSA has expressly provided as

such. An example of this is s 183, where reference is made to proceedings in any court or tribunal. It is a principle of construction that words used in one section of an Act would be presumed to mean the same thing when used in another section. Because in s 183 Parliament had made specific references to a court and a tribunal, the implication would be that the word court when used elsewhere in the FSA would not include a tribunal and would be limited to courts of law.

[9] Counsel for the respondents referred to the case of *Isuta International Sdn Bhd & Ors v Mahkamah Perusahaan Malaysia & Anor* [2013] 8 CLJ 1040 as authority for the proposition that the word 'court' would encompass the Industrial Court. However, in my judgment, this case can be distinguished on the basis that it was concerned with the effect of a winding up order on a company pursuant to s 226(3) of the Companies Act 1965. This provision, unlike s 151(3) of the FSA, does not purport to confer any power to the court, but rather provides for a restriction in proceedings without leave of the High Court.

[10] The ratio decidendi of this case is found at para 20 of the judgment:

> The words 'action or proceeding' (taken separately or together, irrespective) as found in s 263(2) (or for that matter in s 226(3) of the COA), must also *be accorded a meaning not in isolation but in the context of the totality of the subject provision*. Read in that context it followed then that the words 'action or proceeding' referred to some mode or step adopted or taken in the judicial arena to enforce a legal right or where some form of 'adjudication' of interest was involved. A clearance from the High Court by way of leave was necessary to commence or proceed with that 'action or proceeding' when it was brought against a company where a creditors' winding-up, whether voluntary or compulsory was underway. (Emphasis added.)

[11] Therefore the meaning of any phrase in a provision must be understood in the context of the provision as a whole. A contextual construction of the word 'court' in this case, as explained in para 8(b) above, excludes the Industrial Court.

[12] The foregoing was sufficient to dispose of the application before me. For completeness, I address in the following paragraphs the two alternative interpretations of s 151 of the FSA.

THE ALTERNATIVE CONSTRUCTIONS

[13] Section 151 provides for the confidentiality of certain information or documents produced by Bank Negara in the administration or enforcement of the provisions of any written law administered by Bank Negara. These information or documents include any rating or assessment of any person

regulated by Bank Negara, and any order or direction issued by Bank Negara to such person (s 151(2); note however that this definition is non-exhaustive). I have referred to these documents or information as being subject to the *Bank Negara privilege*.

[14] Section 151(3) provides for the ability of a court to order for proceedings to be held *in camera* where it appears that a document that is subject to the Bank Negara privilege would be likely to be disclosed in court proceedings. Where the court orders for proceedings to be held *in camera*, the legal consequence would be that the document or information in question would be subject to a secrecy obligation.

[15] It will be apparent that the draftsperson has employed an ellipsis in the drafting of this provision, because s 151 does not specifically provide for the ability of the court to order the production of any document that is subject to the Bank Negara privilege. All it provides is the discretion of the court to order that proceedings be held *in camera* where it appears that a privileged document is likely to be disclosed.

[16] One possibility is that the power is implied by s 151 itself, on the basis that if the court has the discretion to order that proceedings are to be held *in camera*, then it would follow by necessary implication that the court would be empowered to order the production of the document in the first place.

[17] The alternative interpretation is that the power of the court to order the production of any document would be an inherent power of the court, and that s 151(3) merely provides firstly guidance to the court as to how to exercise its discretion in making any order for the production of documents that are subject to the Bank Negara privilege, and secondly for the consequences that flow from any order for proceedings to be held *in camera*.

[18] As I have explained at para 8(a) above, whichever interpretation is adopted, the conclusion would remain the same: the word 'court' here would necessarily refer to a court of law, and not to a court of arbitration like the Industrial Court. As a result, it will not be necessary for me for the present purposes to express a view on which would be the correct construction of s 151 of the FSA.

ORDERS

[19] The application for certiorari was therefore allowed. Parties had agreed beforehand that there were to be no order as to costs.

[20] I wish to record my appreciation to the representatives from Bank Negara Malaysia who greatly assisted the court in appearing as amicus curiae. A

Application allowed with no order as to costs.

Reported by Nisha Paran B

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